No. 10-709

Supreme Court, U.S.
FILED
DEC 16 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANE E. BENTLEY,

Petitioner,

vs.

ATLANTIC COUNTY, NEW JERSEY; THE OFFICE OF THE SHERIFF OF ATLANTIC COUNTY, NEW JERSEY; JAMES MCGETTIGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF ATLANTIC COUNTY; JOSEPH CONNELLY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On October 28, 2003, Atlantic County New Jersey Sheriff's Officer Jane E. Bentley (Bentley) walked into a room where other Sheriff's officers were processing individuals who had been arrested, and declared that she wanted to "see the nine officers who beat up that poor woman." The incident was reported to Under Sheriff Joseph Connelly (Connelly), who was concerned by what he perceived to be Bentley's allegation of criminal conduct by other officers. Connelly met with Bentley on November 5, 2003 to discuss the matter.

Bentley behaved emotionally and irrationally during the meeting. When asked about the October 28 incident, she told Connelly "I'm tired of all these people persecuting me for things, and I might not remember what I said." Connelly suspected that Bentley might be psychologically unfit for duty. He directed her to prepare a written report of the October 28 incident. Bentley told another officer that she did recall the incident, but her report nevertheless stated that she did not recall the incident. After receiving Bentley's report, Connelly suspended her, not as a form of discipline but because he believed that she was psychologically unfit for duty. Bentley was then formally suspended from duty, with pay, pending a November 12, 2003 examination by a psychologist. Bentley was not told at the time that her suspension was not disciplinary.

Bentley's union retained Steven Cohen, Esquire (Cohen) to represent her. Insisting that the suspension was disciplinary, Bentley filed a grievance, the first step in her collective bargaining agreement for contesting disciplinary action. Atlantic County Counsel James Ferguson (Ferguson) responded to the grievance by asserting that the suspension was not disciplinary because Bentley was not being punished. Ferguson advised Cohen by the end of January 2004 that Bentley's suspension was not considered disciplinary.

The psychologist retained by the County found that Bentley was psychologically unfit for duty. He recommended a neuropsychological evaluation and six months of psychotherapy. Bentley was advised of those findings, advised that she would be classified as unfit for duty and not carried on the payroll as of December 2, 2003, and advised that she could not return to active duty until she completed the testing and treatment recommended by the psychologist.

Bentley continued to contest the suspension as if it was a disciplinary action. She obtained a report by her own psychologist, who found that she was fit for duty, and, on December 18, 2003, she sought binding arbitration of the grievance through the New Jersey Public Employment Relations Commission (PERC). Ferguson filed a petition to restrain arbitration on the ground that non-disciplinary action cannot be arbitrated.

PERC ruled that Bentley could not arbitrate the suspension. PERC noted that Bentley could appeal the suspension directly to the New Jersey Merit System Board, an independent entity in New Jersey's Department of Personnel charged with interpreting New Jersey's Civil Service Act and reviewing employment actions. *N.J.S.A.* 11A:2-6.[1]

On November 12, 2004, Bentley appealed the suspension to the Merit System Board. She argued that the suspension was disciplinary, that she was never served with a notice of disciplinary action, and that a departmental hearing was not conducted as required by civil service regulations governing disciplinary actions. Bentley and the County submitted extensive briefs and documentation to the Merit System Board.

While the appeal to the Merit System Board was still pending, Bentley filed this action in the United States District Court for the District of New Jersey, alleging race and gender discrimination in violation of federal and state law, a violation of her procedural due process rights under the United States Constitution, and a violation of her right to equal protection of the law under the United States Constitution. On July 27, 2005, the Merit System Board issued a written decision. The Board ruled that the suspension was both justified and not disciplinary. (Petition for certiorari, at 43a – 48a)

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1 Atlantic County is a New Jersey civil service jurisdiction.

Bentley never appealed the Merit System Board's decision to the Appllate Division of New Jersey's Superior Court as permitted by New Jersey Court Rule 2:2-3(a)(2), and she never completed the recommended psychological treatment. Accordingly, she remained suspended without pay while this action proceeded. The District Court ultimately dismissed all of Bentley's claims except the procedural due process claim.

The case was tried twice. Prior to the first trial, the District Court ruled that the respondents violated Bentley's due process rights by failing to notify her or her attorney, at the time when she was suspended, that the suspension was not disciplinary. The District Court reasoned that without such notice Bentley would not have known that appealing to the Merit System Board was the correct avenue for obtaining review of the suspension. As a result, Bentley was denied her due process right to a prompt post-deprivation hearing before the Board. (Petition for certiorari, at 13a – 14a)

Bentley also argued that the Merit System Board's procedures did not provide her with due process. The District Court rejected the argument and held that the Merit System Board's procedures comported with constitutional due process. (Petition for certiorari, at 10a – 13a).

The District Court also held that an earlier appeal to the Merit System Board would not have changed the Board's ultimate decision. (Petition for

certiorari, at 14a – 16a) Accordingly, the District Court ruled that Bentley was not entitled to compensatory damages caused by the suspension itself because even if the due process violation had not occurred and Bentley had filed an earlier appeal to the Merit System Board, the Board would have reached the same decision regarding the merits of the suspension. As the District Court put it: "If Plaintiff had appealed to the Merit Board a year earlier, the result would be exactly the same; it simply would have occurred earlier." (Petition for certiorari, at 16a)

The only remaining issue to be tried was damages. The District Court allowed Bentley the opportunity to prove that she experienced emotional distress as a result of the constituional violation; that is, emotional distress caused by the delay in obtaining review of the suspension by the Merit System Board. (Petition for certiorari, at 16a – 17a) At a pre-trial conference on September 12, 2008, the District Court ruled that Bentley could recover damages only for emotional distress that was severe.

The first trial resulted in a verdict in favor of Bentley for $92,000. The District Court granted the respondents' motion for a new trial, in part because Bentley's counsel suggested, through questioning of witnesses and in closing argument, that Bentley could recover damages for emotional distress attributable to the suspension itself, as opposed to emotional distress caused by the delay in obtaining review by the Merit System Board.

At the start of the second trial, the District Court ruled, consistent with its prior decisions, that any delay in appealing to the Merit System Board caused by the failure to advise Bentley that her suspension was not disciplinary necessarily ended when Bentley's attorney was in fact advised that the suspension was not disciplinary. The parties disagreed when that occurred, and the jury was instructed to preliminarily determine when Bentley's attorney was advised that the suspension was not disciplinary. That factual determination would define the length of the delay in obtaining post-deprivation review for purposes of awarding damages for severe emotional distress, if any, caused by the delay.

The jury for the second trial found that Bentley's attorney was advised no later than January of 2004 that the suspension was not disciplinary. After a brief recess before the trial proceeded on damages, Bentley's attorney advised the District Court that he was withdrawing the claim for emotional distress damages on the ground that he did not believe there was a reasonable likelihood of prevailing on the claim in light of the jury's preliminary verdict. The District Court entered judgment in favor of Bentley for $1.00 in nominal damages. Bentley appealed to the Third Circuit.

The Third Circuit affirmed the judgments and orders of the District Court. Bentley's petitions for rehearing and for rehearing *en banc* were denied.

ARGUMENT

A.

The Merit System Board's Review Afforded The Petitioner Due Process, And An Earlier Appeal Would Not Have Altered The Result

The petitioner seeks review of three issues presented to the District Court and to the Third Circuit: (1) whether the Merit System Board would have reached the same decision if Bentley had been given the "opportunity to explain her position"; (2) whether the Board's finding that the suspension was justified foreclosed evidence of Bentley's economic losses resulting from "the due process violation"; and, (3) whether Bentley had to prove that she experienced severe emotional distress caused by "the due process violation" in order to recover damages for emotional distress. (Petition for certiorari, at 11 – 12)

The first two issues raised by the petitioner require, and are resolved by, the answer to the same basic question: Did the Merit System Board's review of the suspension satisfy due process?

The petitioner's statement of the first issue assumes that the Board's review did not provide Bentley with due process. The District Court would have been required to determine whether a review that satisfied due process would have resulted in a

decision that the suspension was improper only if the Board's review did not satisfy due process. If the Board's review did satisfy due process, it's finding that the suspension was justified was dispositive of that state law issue, and Bentley was not entitled to damages caused by the suspension itself. [2]

A person seeking damages resulting from procedural deficiencies in connection with a justified deprivation of rights cannot recover damages caused by the deprivation; damages may be awarded only for actual injuries, such as emotional distress, caused solely by the procedural violation. *See Carey v. Piphus*, 435 U.S. 247, 260 (1978).[3]

The petitioner's statement of the second issue also assumes that the Board's review did not provide her with due process. Again, the District Court would have needed to decide whether a constitutionally

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2 In that regard, this case is analogous to federal *habeas corpus* cases, where it is "axiomatic that federal ... courts do not sit to re-examine state court determinations of state law." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Federal courts do not have supervisory authority over state proceedings, and may intervene only to correct wrongs of constitutional dimension, not errors in determinations of state law or procedures. *Id.*; *see also Smith v. Phillips*, 455 U.S. 209, 221 (1982)

3 If a procedurally deficient but justified deprivation did not cause actual damage, a plaintiff may still recover nominal damages of $1.00 for the procedural violation. *Carey*, 435 U.S. at 267. That is what occurred in this case.

adequate review would have resulted in a finding that the suspension was improper only if the "due process violation" at issue was a constitutionally deficient review by the Merit System Board. Only in that event would the Court have had to decide what economic damages Bentley sustained due to the suspension itself. If the Board's review satisfied due process, its finding that the suspension was justified barred recovery of economic damages caused by the suspension itself.

The District Court ruled that the petitioner was not entitled to compensatory damages resulting from the suspension because the Merit System Board found that the suspension was justified. However, the Court held that the petitioner was entitled to damages for any emotional distress caused by any delay in appealing to the Board that was occasioned by the respondent' failure to advise the petitioner that her suspension was not disciplinary.

Did the Merit System Board's review of the suspension satisfy due process? Clearly it did. This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). However, it is well settled that due process does not require formal testimonial hearings that include direct and cross-examination of witnesses. *See Bd. of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978); *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975).

The nature of the hearing required by due process depends on a balancing of three interests: (1) the private interest at stake, (2) the risk of error in the procedure used compared with the degree of improved accuracy that additional procedures would provide, and (3) the government's interest. *Mathews*, 424 U.S. at 334-335; *Wilson v. MVM*, 475 F.3d 166, 178 (3d Cir. 2007).

The District Court addressed each of the *Mathews* factors and found, on balance, that the Merit System Board's review of the petitioner's suspension provided her with due process. (Petition for certiorari, at 10a – 13a) The petitioner was permitted to and did submit briefs and other documentation to the Board, including the report of her psychologist, and to present argument with respect to the merits of her suspension. As the District Court stated, a more formal hearing would not have significantly enhanced the accuracy of the Board's determination that the respondents' decision to temporarily suspend an employee believed to be psychologically unfit for duty was justified.

Under these circumstances, the District Court correctly determined that the Merit System Board's review provided the petitioner with the opportunity to be heard in a meaningful, albeit untimely manner, and that the petitioner availed herself of that opportunity. (Petition for certiorari, at 13a). The Third Circuit agreed.

The petitioner has, throughout this litigation, collaterally attacked the merits of the Merit System Board's decision in an attempt to recover economic damages caused by the suspension. First, she argued that constitutional due process required a departmental hearing regarding the suspension pursuant to state civil service procedures for reviewing disciplinary actions. She contended that a hearing officer might have ruled that her suspension was not justified. The District Court properly rejected that argument on the ground that federal due process rights are not defined by state law procedures. (petition for certiorari, at 8a – 9a) [4]

Second, the petitioner argued, as she does now, that the Merit System Board's review was itself constitutionally deficient because the Board did not permit oral argument or the presentation of in-person testimony by witnesses. As noted above, the District Court properly rejected that argument.

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[4] Even if a departmental hearing was conducted pursuant to New Jersey's civil service procedures for reviewing disciplinary actions, the respondents would have argued that the suspension was not disciplinary and not subject to review by the department hearing officer. If the department hearing officer disagreed and determined that the suspension was justified, the respondents would have rejected the hearing officer's finding, leaving Bentley to appeal to the Merit System Board. *See N.J.S.A.* 11A:2-14. Thus, in any event, Bentley would have ended up at the Merit System Board and obtained the same result.

The petitioner now asserts, for the first time, that the District Court should have allowed the jury to decide whether the Merit System Board's review satisfied due process, and, if the jury found that it did not, whether a review that did (presumably a review that included a formal testimonial hearing with examination of witnesses) would have resulted in a decision that the suspension was improper. (Petition for certiorari, at 13 – 15)

First, we specifically object to the petitioner's attempt to raise this issue for the first time in her petition for certiorari. This Court ordinarily will not decide questions not raised or litigated in the lower courts. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987), citing *California v. Taylor*, 353 U.S. 553, 556 n2 (1957). While the petitioner did argue below that the Merit System Board's review did not in itself afford the petitioner due process, the petitioner did not argue to the District Court or to the Third Circuit that a jury, not the court, should have made that determination, and neither the District Court nor the Third Circuit discussed or decided that issue.

Without waiving that objection, we submit that the cases cited by the petitioner in support of her argument, *Stein v. The Bd. of the City of New York*, 792 F.2d 13 (2d Cir. 1986), *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991), and *Hill v. City of Pontotoc*, 993 F.2d 422 (5th Cir. 1993) are inapposite. In *Brewer*, the plaintiff was not provided with any hearing, so the District Court was required to determine whether the plaintiff would have been

fired even if provided with a constitutionally adequate hearing. In *Stein*, a fact issue whether the plaintiffs had been provided with adequate *notice* of a hearing was submitted to the jury. In *Hill*, a jury was asked to and did decide whether the plaintiff was afforded due process in connection with a hearing where he was not advised of certain charges that played a role in the decision to fire him. The jury found that the plaintiff was not afforded due process, and that he would not have been fired if afforded a constitutionally adequate hearing. The Fifth Circuit affirmed without discussing why a jury, as opposed to the District Court, decided the issue of the adequacy of the hearing.

The Courts of Appeal in the cases cited by the petitioner did not hold that every challenge to the constitutionality of a hearing must be submitted to a jury. In *Hill*, where the question was submitted to a jury, the Fifth Circuit did not discuss whether submission to the jury was required because there were fact issues that a jury had to decide. Here, there were no jury questions relevant to the issue of the constitutionality of the Merit System Board's review, and that issue was appropriately decided by the District Court. *See Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992), abrogated on other grounds, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

The petitioner has failed to present any convincing argument that the Merit System Board's review was constitutionally inadequate, or that the issue of the constitutionality of the Board's review should have been decided by the jury.

B.

It Was Appropriate To Require The Petitioner To Prove That Her Emotional Distress Was Severe In Order To Recover Damages For Any Actual Injury Caused By The Due Process Violation

The petitioner argues that the District Court misinterpreted federal law by requiring proof that the petitioner experienced severe emotional distress in order to recover damages for any actual injury caused by the due process violation. We submit that the District Court's ruling in that regard was neither error nor inconsistent with this Court's opinion in *Carey v. Piphus*, 435 U.S. 247, 260 (1978).

Carey involved claims for damages by students suspended from school without a hearing that afforded them due process. The Court concluded that 42 U.S.C. § 1983 was intended to create a species of tort liability in favor of persons deprived of rights, privileges, or immunities secured to them by the Constitution. *Id.* at 253. The Court noted that the

common law of torts has developed rules to implement the principle that a person should be compensated fairly in a § 1983 action for injuries caused by a violation of his legal rights, and that "these rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point" for determining how to compensate actual injuries caused by violations of due process rights. *Id.* at 257-258. The Court noted that 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is "necessary to furnish suitable remedies." *Id.* at 257 n13.

The District Court properly applied the principles expressed in *Carey* by looking to the common law of New Jersey to determine whether the petitioner actually experienced emotional distress caused by the constitutional violation at issue in the case – the delay in obtaining post-deprivation review by the Merit System Board.

Recovery of damages for emotional distress in New Jersey, as in many states, requires evidence of severe emotional distress. *Decker v. Princeton Packet, Inc.*, 116 N.J. 418, 429-430 (1989)(negligent infliction of emotional distress); *Buckley v. Trenton Saving Fund Soc'y*, 111 *N.J.* 355, 366-367 (1988)(intentional infliction of emotional distress). The severity requirement addresses concerns about the validity of claimed emotional distress by enhancing the likelihood that the claim is not spurious. *Decker*, 116 N.J. at 429-430.

This Court has expressed the same concerns about the genuineness of emotional distress claims, which, due to their inherently subjective nature, can be fraught with vagueness and speculation, or even be trivial or fictitious. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 545 (1994). Indeed, the Court recognized in *Carey* that it is not reasonable to assume that procedural deficiencies are inherently likely to cause emotional distress, and that, as in this case, *a person may not even know that procedures were deficient* until enlisting the aid of counsel to challenge a perceived substantive deprivation. *Carey*, 435 U.S. at 263.[5]

By requiring the petitioner to demonstrate that she experienced severe emotional distress, the District Court did not require any particular type or quantum of evidence to satisfy that burden. We agree with the petitioner that federal courts have not uniformly imposed state law requirements regarding the type or quantum of evidence necessary to prove emotional distress in § 1983 actions. *See Price v. City*

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[5] Courts at times apply a more lenient standard where the conduct involved is particularly egregious or abhorrent, such that it can reasonably be expected to cause genuine emotional distress. *United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir.1992)(racial discrimination); *Tarr v. Ciasulli*, 181 N.J. 70, 81-82 (2004)(extraordinarily demeaning sexual harassment). This is not such a case. *See Alston v. King*, 231 F.3d 383, 388 (7th Cir. 2000)(the failure to provide a pre-termination hearing is not inherently degrading conduct that portends emotional distress).

of Charlotte, 93 F.3d 1241 (4th Cir. 1996)(testimony of plaintiff alone, without corroborating evidence, may be sufficient to justify an award of damages for emotional distress).

Because the District Court did not require the petitioner to prove severe emotional distress by presenting evidence other than her own testimony, the petitioner's failure to proceed with the damages part of the second trial bars her from now asserting that the District Court erred by imposing the severity requirement. The petitioner may well have prevailed if her testimony, together with any other evidence that she presented, convinced the jury that she did experience severe emotional distress as a result of the delay in obtaining post-deprivation review by the Merit System Board.[6]

Even if the petitioner had not waived her right to claim that the District Court erred by imposing a severity requirement for proving emotional distress, it is clear that the District Court correctly looked to New Jersey law as a starting point in defining the elements of the petitioner's federal law claim for emotional distress resulting from the denial of her right to due process. The severity requirement effectively addresses state and federal court concerns regarding the genuineness of emotional distress,

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6 The petitioner refused to proceed with the damages portion of the second trial because the jury's preliminary finding limited the time period during which emotional distress was compensable, and not because of the requirement that she prove severe emotional distress.

without requiring any particular type or quantum of supporting evidence.

VI. CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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